No. 89-686



# In the Supreme Court

OF THE

# United States

OCTOBER TERM, 1989

JAMES B. BEAM DISTILLING CO.,
*Petitioner,*

VS.

STATE OF GEORGIA, JOE FRANK HARRIS, individually and as Governor of the State of Georgia, MARCUS E. COLLINS, individually and as Georgia State Revenue Commissioner, and CLAUDE I. VICKERS, individually and as Director of the Fiscal Division of the Department of Administrative Services,
*Respondents.*

On Writ of Certiorari to the Supreme Court of Georgia

## AMICUS CURIAE BRIEF OF THE STATES OF CALIFORNIA, WISCONSIN, NEW MEXICO, OHIO, MICHIGAN, NEBRASKA, HAWAII, WEST VIRGINIA, WASHINGTON, SOUTH DAKOTA, UTAH, CONNECTICUT, FLORIDA, IDAHO, AND THE DISTRICT OF COLUMBIA IN SUPPORT OF RESPONDENTS

JOHN K. VAN DE KAMP
Attorney General of
the State of California
RICHARD F. FINN
Supervising Deputy
Attorney General
*Counsel of Record*
455 Golden Gate Avenue
ROOM 6200
San Francisco, CA 94102
Telephone: (415) 557-0653
*Attorneys for Amicus Curiae*
*State of California*

*Of Counsel:*
ERIC J. COFFILL
*Senior Staff Counsel*
*California Franchise Tax Board*
P.O. Box 1468
Sacramento, CA 95812

BOWNE OF SAN FRANCISCO, INC. • 190 NINTH ST. • S.F., CA 94103 • (415) 864-2300

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

### Cases



### Other Authorities



No. 89-680

# In the Supreme Court

OF THE

# United States

OCTOBER TERM, 1989

JAMES B. BEAM DISTILLING CO.,
*Petitioner,*

vs.

STATE OF GEORGIA, JOE FRANK HARRIS, individually and as Governor of the State of Georgia, MARCUS E. COLLINS, individually and as Georgia State Revenue Commissioner, and CLAUDE I. VICKERS, individually and as Director of the Fiscal Division of the Department of Administrative Services,
*Respondents.*

**On Writ of Certiorari to the Supreme Court of Georgia**

## AMICUS CURIAE BRIEF OF THE STATES OF CALIFORNIA, WISCONSIN, NEW MEXICO, OHIO, MICHIGAN, NEBRASKA, HAWAII, WEST VIRGINIA, WASHINGTON, SOUTH DAKOTA, UTAH, CONNECTICUT, FLORIDA, IDAHO, AND THE DISTRICT OF COLUMBIA IN SUPPORT OF RESPONDENTS

## INTEREST OF AMICUS CURIAE

The State of California, on behalf of the California Franchise Tax Board, submits this brief, pursuant to Rule 37, as amicus curiae in support of respondent State of Georgia.[1] The following States join California in this brief: Wisconsin, New Mexico, Ohio, Michigan, Nebraska, Hawaii, Washington, South Dakota, Utah,

[1] Pursuant to Rule 37.5, California is not required to obtain the consent of the parties to file this brief.

Connecticut, Florida, Idaho, West Virginia and the District of Columbia.

While California recognizes the importance of this case to Georgia, the concern of amicus curiae reaches far beyond the resolution of *Beam*. This case presents the Court with the opportunity to speak directly to the larger issue of under what circumstances must a state be required to refund taxes[2] collected under a state statute that is subsequently determined by the Court to be unconstitutional under the Commerce Clause. This question recently has been addressed in *McKesson Corp. v. Division of Alcoholic Beverages and Tobacco*, 495 U.S. ____, 110 L.Ed.2d 17 (1990); *American Trucking Assns. v. Smith*, 495 U.S. ____, 110 L.Ed.2d 148 (1990); and *Ashland Oil, Inc. v. Caryl*, 497 U.S. ____, 111 L.Ed.2d 734 (1990). However, resolution of the retrospective/prospective issue as it is presented in this case will require the Court to articulate in greater detail than in these previous decisions precisely when the first prong of the test in *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971) is satisfied. Specifically, amicus urges this Court to address an issue of great importance to the states' ability to administer their tax and revenue laws. That issue is whether the first prong of *Chevron* is satisfied where a state has reasonably relied upon a decision of its appellate court upholding a statute later determined, after a decision of this Court, to be violative of the Commerce Clause.

## SUMMARY OF ARGUMENT

In *Chevron Oil Co. v. Huson*, this Court established a three-pronged test governing consideration of whether to impose a civil decision prospectively or retroactively. The plurality decision in the recent *American Trucking Assns. v. Smith*, *supra* 495 U.S. ____, 110 L.Ed.2d 148 case applied the *Chevron* test to the determination of retroactivity in cases declaring state taxes unconstitutional.

---

[2] Or otherwise provide a remedy consistent with *McKesson Corp. v. Division of Alcoholic Beverages and Tobacco*, 495 U.S. ____, 110 L.Ed 2d 17 (1990)



The first prong of *Chevron*, whether the decision to be applied nonretroactively establishes a new principle of law, either by overturning clear past precedent on which litigants may have relied, or by deciding an issue of first impression whose resolution was not clearly foreshadowed, may be satisfied where a state has relied upon a decision of its own appellate court, and should not be limited only to situations where the United States Supreme Court has decided the issue.

## ARGUMENT

### THE FIRST PRONG OF *CHEVRON* SHOULD BE LIBERALLY INTERPRETED IN FAVOR OF A FINDING OF A NEW PRINCIPLE OF LAW

This Court's recent decision in *American Trucking Assns. v. Smith, supra*, at 495 U.S. ____, 110 L.Ed.2d 148, directly confronted the issue of whether a decision declaring a tax unconstitutional under the Commerce Clause must apply retroactively or may apply prospectively. Under the reasoning of the four-member dissent, constitutional decisions apply retroactively to all cases on direct review. *American Trucking Assns., supra*, at p. ____, 110 L.Ed.2d 148, 177-178 (Stevens, J., dissenting). Under the approach of the plurality, the *Chevron* test is to be applied. *Supra*, at 110 L.Ed.2d 148, 160-163.

It is well settled that the Constitution neither prohibits nor requires retroactive effect. *Great Northern R. Co. v. Sunburst Oil & Refining Co.*, 287 U.S. 358, 364 (1932). In *Chevron Oil, supra*, 404 U.S. 97, this Court set forth three general factors to be considered when dealing with the nonretroactivity question outside the criminal area:

> "*First, the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied or by deciding an issue of first impression whose resolution was not clearly foreshadowed.* Second, it has been stressed that we must . . . weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further

or retard its operation. Finally, we have weighed the inequity imposed by retroactive application, for where a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the injustice or hardship by a holding of nonretroactivity." 404 U.S. at 106-107 (citations and internal quotations omitted, emphasis added).

*Chevron* did not directly address the question of when retroactive effect should be given to a ruling of unconstitutionality, for the case held only that a decision specifying the applicable state statute of limitations in another context should not be applied retroactively because, among other reasons, the decision overruled clear Circuit precedent on which the complaining party had been entitled to rely. However, the applicability of *Chevron* in the broader context of *all* civil cases was resolved in later decisions of the Court.

In *Griffith v. Kentucky*, 479 U.S. 314, 328 (1987), it was announced that a "new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final, with no exception for cases in which the new rule constitutes a 'clear break' with the past." The *Griffith* opinion stated in no uncertain terms that the area of civil retroactivity "*continues* to be governed by the standard announced in *Chevron Oil Co. v. Huson.*" 479 U.S. at 322, n. 8 (emphasis added). *Griffith* relied heavily upon *United States v. Johnson*, 457 U.S. 537 (1982), in formulating this new standard of retroactivity in criminal cases. The *Johnson* opinion also affirmed the continued vitality of the *Chevron* standard for civil cases by pointing out that "*all questions of civil retroactivity* continue to be governed by the standard enunciated in *Chevron Oil Co. v. Huson.*" 457 U.S. at 563 (emphasis added).

The plurality in *American Trucking Assns.* recognizes *Griffith* and *Johnson* as standing for the proposition that retroactivity in cases declaring state taxes unconstitutional is to be determined under *Chevron*. Such recognition is correct, notwithstanding the claim of the dissent that the plurality's conclusion is "supported by nothing more than a misreading . . ." of *Chevron*. *Supra*, at 110 L.Ed.2d 148, 178 (Stevens, J., dissenting).



The first prong of *Chevron* looks to whether the decision to be applied nonretroactively "must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied, or by deciding an issue of first impression whose resolution was not clearly foreshadowed." 404 U.S., at 106. The plurality in *American Trucking Assns.* found this first test of nonretroactivity satisfied in analyzing *American Trucking Assns., Inc. v. Scheiner*, 483 U.S. 266 (1987) because both the majority and dissent in *Scheiner* "left very little of the *Aero Mayflower [Aero Mayflower Transit Co. v. Board of Railroad Comm'rs of Montana*, 332 U.S. 495 (1947) and *Aero Mayflower Transit Co. v. Georgia Public Service Comm'n*, 295 U.S. 285 (1935)] line of precedents standing." *Supra*, at 110 L.Ed.2d 148, 160. More recently, in *Ashland Oil, Inc. v. Caryl*, 497 U.S. ____, 111 L.Ed.2d 734 (1990), this Court stated its decision in *Armco, Inc. v. Hardesty*, 467 U.S. 638 (1984) was "not revolutionary", and did not meet the first prong of the *Chevron* test because it "did not overrule clear past precedent nor decide a wholly new issue of first impression. . . ." *Supra*, at 497 U.S. ____.

Amicus California respectfully urges the Court to exercise restraint in interpreting the first prong of the *Chevron* test in what appears to be an increasingly narrower manner leading to few or no situations where a decision would apply prospectively only. The direction of this Court suggests that ultimately, perhaps the only situation in which that prong would be satisfied is where one United States Supreme Court decision is expressly overruled in a majority opinion of a later United States Supreme Court decision. Such an interpretation is not supportable under *Chevron* and would work a great hardship on the states.

Contrary to the language in *Ashland*, the first prong of the *Chevron* test does not, and should not, require the new decision to be "revolutionary" or to decide a "wholly" new issue of first impression, in order for a decision to be applied prospectively. *Chevron* set forth a far broader, and more appropriate, standard for the first prong than what is suggested in *Ashland Oil* and *American Trucking Assns.* The case at bench provides this Court with the opportunity to elucidate upon the proper test.

The first prong of *Chevron* is satisfied if the decision overrules "clear past precedent on which litigants may have relied" 404 U.S. at 106. Amicus submits that litigants should be entitled to reasonably rely upon "precedent" *other than* United States Supreme Court decisions, and that good faith reliance by a state upon a decision of its appellate court or, indeed, on a longstanding state statute that has never been questioned in court, should satisfy the first prong of *Chevron*. See *Butler v. McKellar*, 494 U.S. ____, 108 L.Ed.2d 347, 354-357 (1990). A ruling that a state may not rely on taxes collected unless and until the validity of each tax statute has been fully tested in the highest court in the nation would impose an unreasonable burden on a state's power to govern.

In the instant case, the statute in question was challenged in 1939 in Georgia state court on the grounds that it violated the Commerce Clause of the United States Constitution. The statute was upheld in *Scott v. State*, 187 Ga. 702, 2 S.E. 2d 65 (1939), overruled on other grounds, *Blackston v. Georgia Department of National Resources*, 255 Ga. 15, 334 S.E.2d 679 (1985). After the *Scott* decision, the tax was not challenged again until 1985. In that case, the constitutionality of the 1985 amendment to the statute, enacted by Georgia in response to *Bacchus Imports Ltd. v. Dias*, 468 U.S. 263 (1984), was upheld by the Georgia Supreme Court in *Heublein, Inc. v. Georgia*, 256 Ga. 578, 351 S.E.2d 190 (1987), appeal dismissed, 483 U.S. 1013 (1987). The Georgia Supreme Court concluded in its decision in *Beam* that during the time the taxes at issue here were collected, Georgia had no reason to believe that the import taxes were unconstitutional. Moreover, when it became clear there might be constitutional problems with the statute, the legislature moved promptly to amend the statute to rectify the defects. See *James B. Beam Distilling Co. v. State of Georgia*, 259 Ga. 363, 383 S.E.2d 95 (1989).

Georgia was entitled under these circumstances to rely upon its *Scott* decision as "clear past precedent" within the meaning of the first prong of the *Chevron* test. Query: What is a state to do when its appellate court upholds the constitutionality of a tax statute enacted by its legislature, and the state court decision then goes unchallenged or, indeed, a state statute generates no court challenge at all? Given the alternatives, it is certainly more reasonable for that state to rely upon the decision of its court than to be forced to "second guess" the wisdom of that decision and not enforce the statute because of the mere possibility that the statute might fail to withstand another constitutional attack at some future time. Amicus submits that where a state chooses the former alternative over the latter, the first prong of *Chevron* is satisfied.[3]



The fact *Scott* constituted precedent which could reasonably be relied upon by Georgia is also demonstrated by petitioner's own actions. Although the Georgia statutory scheme has been in place for decades, this action is based only upon petitioner's claim for refund of taxes assessed and collected from petitioner during 1982 through 1984. This Court decided *Bacchus Imports* on June 29, 1984. *Supra*, 468 U.S. 263. The administrative claim for refund which constitutes the basis of this action was filed by petitioner on or about April 25, 1985. (Appendix to Petition for Writ of Certiorari, Ex. C, para. 14.) Surely there can be no greater evidence of the reasonableness of the State of Georgia's reliance for over forty years upon *Scott* that the statute was constitutional than the fact the petitioner bringing the action itself *did not even challenge the statute until nearly one year after Bacchus* was decided. Petitioner's course of conduct is consistent with the conclusion of the Georgia Supreme Court in this case that Georgia had no reason to believe, after *Scott* but before *Bacchus*, that the statute in issue was unconstitutional.

---

[3] The former alternative may be the *only* alternative for some states. In California, for example, the law is clear that under the doctrine of stare decisis, all tribunals exercising inferior jurisdiction are required to follow decisions of courts exercising superior jurisdiction. Accordingly, decisions of the California Supreme Court are binding upon and must be followed by all state courts of California. *Auto Equity Sales, Inc. v. Superior Court*, 57 Cal.2d 450, 455, 369 P.2d 937 (1962). In addition, under article III, section 3.5 of the California Constitution, an administrative agency such as amicus California Franchise Tax Board "has no power" to declare a statute unenforceable, or to refuse to enforce a statute, on the basis of it being unconstitutional unless an appellate court has made a determination that the statute is unconstitutional.

The argument of amicus that litigants may reasonably "rely" upon something less than a United States Supreme Court decision, such as a state appellate court decision, and still satisfy the first prong of *Chevron* is consistent with the alternative language in *Chevron* that a new principle of law is established where an issue of first impression is decided whose resolution "was not clearly foreshadowed." *Chevron*, 404 U.S. at 106. The fact a statute, or an appellate court decision upholding the constitutionality of a tax statute, remains unchallenged for a significant period of time would be inconsistent with a subsequent finding under *Chevron* that the unconstitutionality of the statute or the overturning of that state court decision was somehow "clearly foreshadowed."

Furthermore, while the third prong of the *Chevron* test specifically looks to "the equity imposed by retroactive application", 404 U.S. at 107, this does not mean that the equities of the situation should be ignored in determining under the first prong whether the parties "may" have relied upon the past precedent being overruled. Statutory rules of law "are hard facts on which people must rely in making decisions and in shaping their conduct. This fact of legal life underpins our modern decisions recognizing a doctrine of nonretroactivity." *Lemon v. Kurtzman*, 411 U.S. 192, 199 (1973) (*Lemon II*). A consequence of this "fact of legal life" is that a state has no choice but to rely upon its statutes[4] and appellate court decisions in making decisions affecting revenue and fiscal interests. Taxes "are the life-blood" of government. *Bull v. United States*, 295 U.S. 247, 259 (1935); *Franchise Tax Board of California v. United States Postal Service*, 467 U.S. 512, 523 (1984).

In sum, the first prong of *Chevron* should be read to militate against retroactive application, and in favor of prospective application, where a decision of this Court disapproves a statute previously declared constitutional by a state appellate court decision which has been reasonably relied upon by the state in

[4] As this Court has made clear, in taxation, even more than in other fields, legislatures possess the greatest freedom of classification. *Austin v. New Hampshire*, 420 U.S. 656, 661-662 (1975).



administering its tax system. This interpretation of *Chevron* is consistent with prior opinions of this Court that prospective application is proper where the decision in issue disapproves a practice this Court has arguably sanctioned in prior cases, or overturns a longstanding and widespread practice to which this Court has not spoken, but which a near-unanimous body of lower court authority has expressly approved. *United States v. Johnson*, *supra*, 457 U.S. at 551; *Solem v. Stumes*, 465 U.S. 638, 646 (1984); see e.g., *Gosa v. Mayden*, 413 U.S. 665, 673 (plurality opinion) (applying nonretroactively a decision that "effected a decisional change in attitude that had prevailed for many decades"). A state's reliance upon longstanding "precedent" of a state appellate court, or on an unchallenged statute, or perhaps in appropriate circumstances the decision of a quasi-judicial adjudicative administrative body as well, upholding the constitutionality of a state tax statute, should be given great deference under the first prong of *Chevron*.

## CONCLUSION

For the reasons stated, this Court should reaffirm the validity of *Chevron;* elaborate upon the proper application of the first prong of *Chevron;* and affirm the judgment of the Georgia Supreme Court.

Dated: August 29, 1990

Respectfully submitted,

JOHN K. VAN DE KAMP
Attorney General of
the State of California

*Of Counsel:*
ERIC J. COFFILL
*Senior Staff Counsel*
*California Franchise*
*Tax Board*

RICHARD F. FINN
Supervising Deputy
Attorney General
*Counsel of Record*
*Attorneys for Amicus*
*Curiae State of*
*California*